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No. 71-707

In the Supreme Court of the United States

OCTOBER TERM, 1971

ARIZONA STATE DEPARTMENT OF PUBLIC WELFARE,
PETITIONER

v.

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE, SOCIAL AND REHABILITATION SERVICE, JOHN D. TWINAME, ADMINISTRATOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Pursuant to the Social Security Act, 42 U.S.C. 301, *et seq.*, the federal government provides grants-in-aid to states which administer programs for supplying assistance to specified categories of needy individuals and families. States choosing to receive these grants-in-aid are required to formulate plans for administering the assistance programs (Pet. App. A2). While the Act gives the states broad discretion in designing many aspects of the plans, it prescribes certain requirements

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with which a state's plan must comply in order to be eligible for grants-in-aid (Pet. App. A2).

Before the Secretary of Health, Education, and Welfare, acting through the Administrator of Social and Rehabilitation Service, can approve any such plan, he must determine that it conforms to those federal requirements. If the Secretary questions a state plan's conformity to federal requirements, he must provide reasonable notice and opportunity for hearing to the state agency administering the plan (Pet. App. A3). Following a conformity hearing, if the Secretary determines that the plan does not meet federal requirements, he must terminate federal payments to the state program until the non-compliance is cured (Pet. App. A3). The state is entitled to judicial review, in a United States Court of Appeals, of the Secretary's order of termination. 42 U.S.C. 1316.

In the instant case, the Administrator determined, after a conformity hearing, that four of the assistance programs administered by the Arizona state agency[1] were out of conformity with federal requirements in four respects. First, the Administrator found Arizona's conclusive presumption of termination of residency after a 90-day absence (Arizona Rev. Stat. § 46–209) to be inconsistent with the HEW regulation defining residency as continuing as long as there is an intent to return (34 Fed. Reg. 8715 (1969)). Second, the

[1] The four programs involved were old age assistance (42 U.S.C. 301, *et seq.*); aid to families with dependent children and child-welfare services (42 U.S.C. 601, *et seq.*); aid to the blind (42 U.S.C. 1201, *et seq.*); and aid to the permanently and totally disabled (42 U.S.C. 1351, *et seq.*).

Administrator found that Arizona's method of excluding income required to be disregarded in calculating need in its program for granting aid to families with dependent children (AFDC) (deducting excluded income from *net* income after expenses) was inconsistent with HEW's regulation requiring such excluded income to be deducted from *gross* income (45 C.F.R. 233.20(a)(7)). Third, the Administrator concluded that Arizona's requirement of legal custody, before a relative (other than the child's natural parent) could receive assistance under AFDC, created a discriminatory classification and was incompatible with the purposes of AFDC.[2] Finally, the Administrator found that Arizona had failed to organize advisory committees involving the needy as required by regulation (45 C.F.R. 220.4).

Accordingly, the Secretary terminated federal payments to the state programs pending state compliance with federal law (Pet. App. B2–B71). The Court of Appeals for the Ninth Circuit stayed the Secretary's order pending its review of the case. After full briefing and oral argument, the court unanimously affirmed the Secretary's decision (Pet. App. A1–A36; 449 F. 2d 456).[3]

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[2] Additionally, the Administrator noted that Arizona's legal custody requirement fell most heavily on Arizona's Mexican-American and Indian populations whose cultural pattern included extended families, which were seldom attended by formal custody arrangements (Pet. App. B49–B50).

[3] The court of appeals continued its stay pending disposition of the instant petition for a writ of certiorari.

Arizona does not deny that its plan is inconsistent with the federal regulations in the four respects found by the Administrator. It contends, however, that the regulations are unauthorized by, or inconsistent with, the Act. However, as this Court stated in *Thorpe* v. *Housing Authority*, 393 U.S. 268, 277, fn. 28, Section 1102 of the Social Security Act, 42 U.S.C. 1302, grants "broad rule-making powers" to the Secretary. See also *Lewis* v. *Martin*, 397 U.S. 552, 559, recognizing "the deference due" HEW as "the agency charged with the administration of the Act." The court of appeals fully considered and rejected petitioner's specific challenges to the regulations, and we rely upon that court's comprehensive and well-reasoned opinion.[4]

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

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[4] The Ninth Circuit's holding on "disregard of earned income for AFDC" (Pet. App. A15–A19) is in accord with a recent decision of the Second Circuit on that identical issue. *Connecticut State Department of Public Welfare* v. *Department of Health, Education, and Welfare*, 448 F. 2d 209.

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